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No. 03-9659

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS JOE MILLER-EL, *Petitioner,*

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

This case raises the question of whether Texas prosecutors committed error under *Batson v. Kentucky*, 476 U.S. 79 (1986), in peremptorily challenging jurors in a capital case. One of the arguments asserted by petitioner in support of his *Batson* claim is that a comparison between the prospective jurors who were peremptorily challenged and those who were retained reveals that the prosecution's challenges were racially based. The parties have not addressed, however, whether an appellate or habeas court may conduct a comparative analysis of challenged and retained jurors if petitioner did not present a comparative analysis to the trial court in support of his *Batson* motion. In California, a reviewing court is precluded from engaging in a comparative analysis if the argument was not raised in the trial court. The interest of California in this case is to preserve its rule and avoid this Court implicitly sanctioning the notion that a defendant may present a comparative analysis for the first time

on appeal or collateral review when no such analysis had been presented to, or evaluated by, the trial court.

SUMMARY OF ARGUMENT

Although *Batson* set forth a framework for evaluating an objection to a discriminatory peremptory challenge, the Court did not specify how to implement the framework it established, instead leaving that task to trial courts. A comparative analysis of the prospective jurors is one means by which a defendant can demonstrate that a party exercised an unconstitutional peremptory challenge. In California, a party must present a comparative analysis to the trial court before such an analysis may be considered on review. This rule ensures that the tribunal most familiar with the facts and best able to evaluate the parties' credibility is able to consider the argument. A reviewing court cannot effectively compare prospective jurors or evaluate the prosecutor's credibility on a cold record.

Whether Texas has such a requirement is unclear, and evidently respondent has never argued that a defendant must assert a comparative analysis argument in the trial court before it may do so again in appellate and habeas courts. Nevertheless, relying in part on this Court's prior decision in *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003), the Ninth Circuit has held that there is no such requirement and has several times engaged in a comparative analysis for the first time on federal habeas review. As a consequence, the Ninth Circuit has found state court *Batson* rulings to be unreasonable based in part on comparative analyses that California appellate courts are barred (quite properly) from undertaking. California seeks to apprise the Court of this situation so that the Court does not inadvertently support the Ninth Circuit practice of allowing a comparative analysis argument to be raised for the first time on federal habeas corpus.

ARGUMENT

IN DECIDING THIS CASE, THE COURT SHOULD NOT SUGGEST (EVEN IMPLICITLY) THAT A DEFENDANT MAY PRESENT A COMPARATIVE ANALYSIS OF THE VENIRE MEMBERS FOR THE FIRST TIME ON DIRECT APPEAL OR COLLATERAL REVIEW

In *Batson*, this Court established a framework involving a three-step procedure for evaluating an objection to an unconstitutional peremptory challenge:

> Under [this Court's] jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam); *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (plurality opinion); *Batson*, 476 U.S. at 96-98. Beyond the three-pronged approach established in *Batson*, however, the Court has not mandated what particular procedures must be used to implement the decision. Rather, the Court has charged trial courts with developing such rules. *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *see also Batson*, 476 U.S. at 99 & n.24.

One tool that some courts have used to evaluate a prosecutor's nondiscriminatory justifications (*Batson* step three) is comparative analysis. This process entails comparing the dismissed jurors (*i.e.*, those alleged to have been peremptorily challenged for an assertedly racially-based reason) with retained jurors who have similar attributes or characterizations to the excused jurors. The information is then factored into the trial

judge's evaluation of whether the peremptory challenges amounted to purposeful discrimination. *See People v. Johnson*, 30 Cal.4th 1302, 1318-1320, 71 P.3d 270 (2003).

In order for comparative analysis to be a fair and effective tool for implementing *Batson*, the defendant must present a comparative analysis argument to the trial court when that court is addressing the defendant's *Batson* motion. An appellate (or habeas) court addressing a comparative analysis argument made for the first time on appeal (or on habeas review) would face several obstacles. The cold record may not even reveal the race of the jurors challenged or retained, let alone body language or demeanor. A reviewing court is simply unable to evaluate important extra-record evidence necessary to determine whether the jurors are truly comparable. In addition, absent the objection being made at trial, the reviewing court would not have the benefit of a contemporaneous response from the prosecutor who exercised the challenge. Without that explanation, the reviewing court's "comparative juror analysis could not accurately take into account the various factors that influence the decision to make a peremptory challenge." *Johnson*, 30 Cal.4th at 1324, n.7 *(citing People v. Johnson*, 47 Cal.3d 1194, 1220-1221, 767 P.2d 1047 (1989)). *See also Miller-El*, 537 U.S. at 339 (quoting *Hernandez*, 500 U.S. at 365) ("There will seldom be much evidence bearing on [whether counsel's race-neutral explanation should be believed], and the best evidence often will be the demeanor of the attorney who exercises the challenge.").

Finally, this Court has emphasized that a trial court's finding that counsel had no discriminatory intent is a "'pure issue of fact'" and therefore is "'accorded significant deference.'" *Miller El*, 537 U.S. at 339 (*quoting Hernandez*, 500 U.S. at 365). In establishing this highly deferential standard of review, the Court has noted concerns such as evidence that does not appear in the record. *Miller-El*, 537 U.S. at 339. Likewise the California Supreme Court has emphasized that "permitting appellate courts to overturn trial court decisions

based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts." *Johnson*, 30 Cal.4th at 1324; *see also State v. Martin*, 68 N.W.2d 399, 405 (S.D. 2004) (generally noting the difficulties associated with conducting comparative analysis on a cold record).

This case does not present the question whether a comparative analysis asserted for the first time before a reviewing court is a proper tool for deciding step three *Batson* issues. To be sure, when this case was last before it, this Court spent considerable time discussing comparative analysis. *Miller-El*, 537 U.S. at 329, 331-335, 343. Indeed, the Court red-flagged the possibility that it would rely upon comparative analysis to decide *Batson* issues in the future: "Whether a comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination *at this stage*, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred." *Id.* at 343 (emphasis added). But that opinion did not address whether all (or any of) the bases of the comparative analysis it discussed were raised in the trial court. There was a good and obvious reason for this. Respondent did not argue to this Court that petitioner waived his comparative analysis argument by failing to assert it in the trial court.

Respondent presumably eschewed that argument because he had previously waived it. The federal magistrate judge, after

noting that petitioner did not "present[ ] to the state court" his comparative analysis (JA 910)[1], explained that:

> The Court asked the parties to brief the issue of whether petitioner fairly presented the factual basis of his "improper questioning" and "comparative juror analysis" claims in state court. *See* Order, 7/28/99. Respondent conceded that these arguments "are subsumed within the broad *Batson* issue and are not tantamount to the presentation of a new claim." (Resp. Supp. Brief at 2). Therefore, the Court will consider these claims on the merits.

JA 910, n.12. Respondent may have made that concession due to the uncertainty in Texas law as to whether a comparative analysis argument may be raised for the first time on appeal. *Compare Young v. State*, 826 S.W.2d 141, 142-46 (Tx. Crim. App. 1991) (holding, in a non-capital case, that a comparative analysis argument *may* be raised for the first time on appeal), *with Turner v. State*, 861 S.W.2d 36, 38-39 (Tex. App.—Houston 1993) (distinguishing *Young* and holding that a comparative analysis argument may *not* be raised for the first time on appeal in a capital case).[2] Alternatively, respondent may have concluded that the state trial court *sua sponte* conducted a comparative juror analysis in the course of holding that the prosecutors did not engage in disparate treatment. *See* JA 878.

The California Supreme Court permits defendants to assert comparative analysis arguments in support of *Batson* motions.

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1. The Joint Appendix for this case will not be available to counsel for Amicus State of California prior to the filing deadline for this Amicus Brief. Therefore, the citations to "JA" refer to the previous Joint Appendix filed with the briefing in *Miller-El*, 537 U.S. 322.

2. Texas law on this issue remains unclear. In *Gibson v. State*, 117 S.W.3d 567, 578-579 (Tex.App.—Corpus Christi 2003), *rev. granted*, (Tex. Crim. App. April 7, 2004), the court stated that the Texas Court of Criminal Appeals had *sub silentio* overruled *Young* in *Ford v. State*, 1 S.W.2d 691, 693 (Tex. Crim. App. 1999).

Significantly, however, it steadfastly refuses to engage in such analysis for the first time on appeal. *Johnson*, 30 Cal.4th at 1325 ("[A] reviewing court should not attempt its own comparative juror analysis for the first time on appeal. . . . While we decline to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate."); *People v. Box*, 23 Cal.4th 1153, 1190, 5 P.3d 130 (2003). In contrast, the Ninth Circuit does not require that a comparative analysis argument be preserved in the trial court. In fact, the Ninth Circuit will engage in comparative analysis, not only for the first time on appeal, but also for the first time on federal habeas review. *See, e.g., Collins v. Rice*, 365 F.3d 667, 681-682 (9th Cir. 2004), *petition for cert. filed*, (U.S. July 7, 2004) (No. 04-52); *U.S. v. Alanis*, 335 F.3d 965, 969 (9th Cir. 2003); *Lewis v. Lewis*, 321 F.3d 824, 832-833 (9th Cir. 2003); *McClain v. Prunty*, 217 F.3d 1209, 1220-1224 (9th Cir. 2000); and *Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997). This creates an obvious problem in federal habeas corpus cases in which the petitioner asserts a *Batson* violation but failed to present a comparative juror analysis to the state trial court. The Ninth Circuit has been finding the credibility determinations of California courts unreasonable, and not entitled to deference under 28 U.S.C. § 2254(d), based on its own comparative analysis. *See, e.g., Collins*, 65 F.3d at 681-682; *Lewis*, 321 F.3d at 832-833; *McClain*, 217 F.3d at 1220-1224.[3] In such cases, the Ninth Circuit is faulting the state appellate courts for having reached unreasonable decisions based on an analysis that the state appellate courts were barred — for perfectly sensible reasons — from undertaking. The differing approaches of the California appellate courts and the Ninth Circuit as to whether

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3. The Ninth Circuit appears to treat the role of comparative analysis that was never raised in the trial court the same whether the case is pre- or post-AEDPA, or whether the case originated in a state or federal court. *Compare, e.g., Turner*, 121 F.3d 1248, *with Alanis*, 335 F.3d at 969.

comparative juror analysis must first be raised in the trial court distorts application of the § 2254(d) deference standard. The California Supreme Court and Ninth Circuit have recognized their different practices. *Johnson*, 30 Cal.4th at 1323-1324; *Burks v. Borg*, 27 F.3d 1424,1427 (9th Cir. 1994) (noting that the United States Supreme Court "has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right").

There are several ways in which the Court's resolution of the instant case may impact the California Supreme Court's rule. This Court's former decision in *Miller-El* did not decide whether comparative analysis must be raised in the trial court before it is considered on review. But in two cases, *Collins*, 365 F.3d at 681-682 and *Alanis*, 335 F.3d at 969, the Ninth Circuit engaged in comparative analysis for the first time on collateral review and cited *Miller-El* when it did so. Apparently, the Ninth Circuit viewed *Miller-El's* discussion of comparative juror analysis -- without a prefatory discussion of whether that analysis was raised in the trial court -- as permitting federal courts to engage in a comparative juror analysis for the first time on collateral review. There is every reason to believe that the Ninth Circuit will look to the Court's opinion in this case for further guidance on this issue even though, once again, the issue is not presented to the Court.

For this reason, it would be very helpful for this Court to make explicit that it is *not* addressing the issue of whether comparative analysis arguments must be raised in the trial court in order for appellate or habeas courts to engage in comparative analyses. Amicus State of California respectfully submits that, if the Court conducts a comparative analysis in deciding petitioner's *Batson* claim, it also note that respondent has waived any argument that the Court should not engage in a comparative analysis because the argument was not preserved in the trial court.

CONCLUSION

California seeks to maintain its rule that comparative analysis may not be raised for the first time on direct appeal and, concomitantly, to receive the benefit of its rule when California cases are collaterally reviewed on federal habeas corpus. In deciding this case, the Court should ensure it does not implicitly support the notion that comparative analysis may be raised for the first time on direct or collateral review - an issue that is not before the Court.

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